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RESOLVING FEE DISPUTES AND LEGAL MALPRACTICE CLAIMS USING ADR

MARK RICHARD CUMMISFORD*

I. INTRODUCTION

Lawyers have long debated how best to resolve fee disputes. The debate, however, appears to assume that any alternative to arbitration should be compared to a litigation model. Perhaps looking at the issue from the perspective of the clients, rather than solely from a lawyer's point of view, could shed some light on possible solutions that use a model other than litigation. As one commentator suggests, "To illustrate one reason why alternative resolution of a fee dispute may not be as beneficial for the client as would appear at first blush, it is helpful to ask a basic question about alternative dispute resolution—alternative to what?"¹ Writing as a young lawyer *and* as a former client mired in a recent fee dispute, this Essay is offered to add to the ongoing study and debate on this subject. It will explore the various methods used to resolve fee disputes, and will offer an overall plan for changing the approach to fee disputes.

Part II of this Essay considers the origin of fee disputes between attorneys and clients, addressing the questions of why and when clients do not pay. This Part will also discuss legal malpractice and its close relation to fee disputes.² As one commentator pointed out, "It should be of no surprise that attorney malpractice and fee disputes are often found lurking in the same lair. In both malpractice and fee disputes, the

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1. Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 638–39 (1997) (recognizing how fee disputes and legal malpractice issues are often interrelated).

2. Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005 (1993).

client believes that he did not get what he paid for."³ Thus, any plan for resolving fee disputes must also address and consider the various problems raised by a client's allegations of legal malpractice.

Violations of the attorney ethical code are closely related to fee disputes and often lead to malpractice actions.⁴ Disputes can arise for a myriad of reasons, including scope of representation,⁵ competence,⁶ or diligence.⁷ In addition, confidentiality may also become an issue in fee disputes because attorneys may be allowed to breach certain confidences in defense of a claim.⁸

Next, Part III of this Essay surveys the options available to clients and attorneys involved in a fee dispute and whether alternative dispute resolution (ADR) processes offer reasonable and desirable alternatives to offensive or defensive litigation. When an attorney wants to collect unpaid fees or when a client files a malpractice action or breach of contract suit, the most obvious course of action may appear to be litigation. Yet, other options exist for the parties. This discussion is followed by Part IV, which looks specifically at arbitration as an alternative to resolving disputes since some states have determined that mandatory fee arbitration is the best method to bring resolution to fee disputes.

In order to better assess whether mandatory fee arbitration is a viable solution for Wisconsin, Part V of this Essay draws on the lessons from other countries and states that have mandatory fee arbitration programs or some other form of distinct fee dispute resolution program in place. For example, England and Australia resolve fee disputes much differently than the United States.⁹ In addition, Part V turns to the systems in place for other professions and trades, such as organized real estate, which mandates that its members arbitrate most disputes.¹⁰ Comparing how other systems resolve fee disputes with the current practices of the legal community will help illustrate why arbitration or

3. Wendy C. Reed, *Recent Development Saffer v. Willoughby*, 12 OHIO ST. J. ON DISP. RESOL. 521, 521 (1997).

4. For instance, ABA Model Rule 1.5 can become an issue in fee disputes. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. (2001) (listing the eight factors in determining the reasonableness of a fee); WIS. SUP. CT. R. 20 (adopting the following ABA Model Rules: 1.1 Competence, 1.2 Scope of Representation, 1.3 Diligence, 1.5 Fees, and 1.6 Confidentiality).

5. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2001).

6. *Id.* R. 1.1.

7. *Id.* R. 1.3.

8. *Id.* R. 1.6.

9. See *infra* Part V.A-B.

10. See *infra* Part V.C.

litigation may not be the only options available to attorneys and clients faced with a fee dispute.

Finally, Part VI of this Essay presents a proposed framework that incorporates both a client's and an attorney's perspective. This Essay concludes that it is important to allow the parties to choose whether they negotiate, mediate, arbitrate, or litigate a fee dispute. Attorneys and clients should have this same right as they do in any other dispute. Any formal process implemented to resolve disputes between attorneys and clients should be constructed to assist, rather than inhibit, the parties in resolving their disputes without reverting to a litigation-type forum.

II. THE ORIGIN OF ATTORNEY-CLIENT FEE DISPUTES

Why do clients neglect to pay their legal fees? Studies suggest that fee disputes are not caused by the client's inability to pay.¹¹ "Fee [disputes are] most common in family law cases and cases where the attorney and client have a one-time relationship . . . and the client is dissatisfied with the results."¹²

In order to help minimize disputes at the outset of the representation, clients should review the original fee contract and inform the lawyer about their concerns.¹³ The clients should also understand how legal fees are calculated. The Wisconsin Bar Association website spells out for clients the eight factors that the court considers when determining the reasonableness of an attorney's fee.¹⁴ These factors reflect the American Bar Association (ABA) Model Rule 1.5, which the Wisconsin Supreme Court adopted as Supreme Court

11. Linda Roberson, *Fees, Fie, Foe, Furr: What Family Lawyers Ought To Know About Attorney's Fees*, available at <http://www.wisbar.org/convention/archive/ann97/outline40.pdf> (last visited Jan. 30, 2002).

12. *Id.*

13. State Bar of Wisconsin, *Fee Arbitration Program*, available at <http://www.wisbar.org/bar/feearb.html> (last visited Jan. 26, 2002) [hereinafter *Fee Arbitration Program*]. Reasonableness is based primarily on factors such as the "time and effort required, as documented by a time and charges bill . . . [and] whether all the time and effort expended were necessary." Roberson, *supra* note 11. "The experience, reputation, and ability of the attorney" are also considered. *Id.* "The nature of the proceedings and the difficulty of the issues . . . [are] often used to reduce hourly charges." *Id.* "The results obtained" by the attorney may also be a factor considered by the courts. Since courts often reduce reviewed fees, attorneys should consider the benefits of arbitration. *Id.* Roberson points out advantages to fee arbitration: "(i) Voluntary; (ii) Courts look upon it with favor; (iii) Informal hearing; (iv) Takes less time than litigation; (v) No or minimal cost to either client or attorneys; (vi) Some protection against malpractice claims." *Id.*

14. *Fee Arbitration Program*, *supra* note 13.

Rule 20:1.5 on fees.¹⁵ These suggestions should help clients engage in a fee arrangement that meets their needs. Lawyers often avail themselves of the flexibility provided by flat fee and contingency fee arrangements when arranging fees with clients. This flexibility allows an attorney and client to reach a fee agreement that the client can honor in most cases.

Nevertheless, problems arise and clients who are involved in a fee dispute must decide to fight or flee in a battle where they are an underdog fighting against the legal system.¹⁶ Clients perceive that the odds are stacked against them, which can leave them feeling powerless and hopeless. The mere power imbalance alone may be enough to dissuade many clients from engaging in litigation.

Clients who are dissatisfied with the handling of their case most commonly cite inefficiencies such as the "[f]ailure to take advantage of prior research and standardized document preparation."¹⁷ Additionally, clients may refuse to pay fees due to a lack of understanding of the billing process, especially when hourly fees are based on tenths of an hour. Clients may also refuse to pay fees due to alleged legal malpractice or ethical violations.

While lawyers may not be liable for honest errors of judgment,¹⁸ they may be liable for numerous other omissions. These can include the following: failing to do minimal research before giving legal advice,¹⁹

15. WIS. SUP. CT. R. 20:1.5. The rule states in part:

Fees (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Id.

16. See discussion *infra* Part III.A.

17. *Id.*

18. See *Hodges v. Carter*, 80 S.E.2d 144, 146 (N.C. 1954) (holding that the lawyer was not liable for an honest error of judgment).

19. See, e.g., *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693-94 (Minn. 1980).

failing to file an appeal on behalf of jailed client,²⁰ failing to give the client advice with reasonable knowledge, skill and diligence,²¹ failing to exercise due care that information given to a third party was correct,²² failing to effectuate a client's instructions,²³ or failing to observe obvious standards of care that may amount to malpractice on the part of an attorney.²⁴

When an attorney commits malpractice, it is not unreasonable that the attorney should forfeit his fees.²⁵ While these disputes over fees tend to get absorbed into the more serious malpractice issue, the fact remains that attorneys must sometimes navigate a great body of law and ethics before they can expect payment from a client.

Fortunately for attorneys, most disputes remain private and confidential and do not become a matter of public record because they are resolved without the intervention of formal court systems.²⁶ As a result, it is difficult to ascertain the number of actual fee disputes and how they are resolved. Nevertheless, it is clear that fee disputes will continue to arise in a variety of contexts and that the parties will have to reach some type of resolution, either inside or outside the courtroom.

III. OPTIONS FOR RESOLUTION

Perhaps the first and most important step toward improving the way attorneys and clients resolve fee disputes is to focus on *how* an attorney should resolve disputes with clients. It has been said that "[n]o single

20. See, e.g., *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

21. See, e.g., *Ziegelheim v. Apollo*, 607 A.2d 1298, 1303 (N.J. 1992) (finding an attorney negligent for failure to give the client advice with reasonable knowledge, skill, and diligence).

22. See, e.g., *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1565-66 (7th Cir. 1987) (holding that an attorney negligently failed to exercise due care to ensure that information given to a third party was correct).

23. *Olfe v. Gordon*, 286 N.W.2d 573, 577-78 (Wis. 1980) (holding that a attorney negligently failed to effectuate a client's instructions regarding a mortgage).

24. *George v. Caton*, 600 P.2d 822, 828 (N.M. Ct. App. 1979).

25. *Burrow v. Arce*, 997 S.W.2d 229, 232 (Tex. 1999). The Texas Supreme Court stated "that whether an attorney must forfeit any or all of his fee for a breach of fiduciary duty to his client must be determined by applying the rule as stated in section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* and the factors we have identified." *Id.* at 245. Further, the court stated that "the ultimate decision on the amount of any fee forfeiture must be made by the court." *Id.*

26. Matthew J. Clark, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 837 (1999) ("[T]he client does not have to worry that information revealed to an attorney in confidence will become part of the public record, and the attorney is able to rest easier knowing that the arbitration process is much less likely to result in negative publicity.").

issue between lawyer and client arises more frequently or generates more public resentment than fee problems."²⁷ Focusing on what affirmative steps an attorney ought to take toward resolving disputes affects not only the relationship between the attorney and client involved in a particular dispute, but it also affects how the public perceives the legal profession. Therefore, it would behoove members of the legal profession to examine the fee dispute resolution options that do not involve the adversarial and negative aspects of litigation-style dispute resolution. In order to flesh out some of the problems with the present system used to resolve fee disputes, it is first necessary to examine the dispute-resolution options currently used by attorneys and clients. After reviewing current practices, it is important to consider what options attorneys and clients *ought* to make available. Following this discussion, included is a proposal to bring attorneys and clients together to take advantage of these options.

Most lawyers have a notion of what options are available to them when clients do not pay.²⁸ However, what options are available to a client who wants to dispute fees charged by his or her lawyer? The options that a client may have include the following: litigation, paying the bill or doing nothing, filing a formal complaint with the Office of Lawyer Regulation, negotiation, mediation, and mandatory or voluntary arbitration.²⁹ When costs and benefits associated with ADR methods are compared with the costs and benefits associated with litigation, it appears that the overall benefits for both parties do not rest in litigation, but rather in some form of ADR. To illustrate this point, the following will examine the options that may be available to an attorney and client engaged in a fee dispute.

A. Litigation

Litigation is not an ideal course of action from the lawyer's point of view.³⁰ When an attorney instinctively resorts to litigation tactics to

27. Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 277 (considering the fiduciary obligations an attorney has to a client and the fairness-in-fact standard used in fee agreements as well as the ethical obligations and standards for judicial review of arbitration).

28. Attorneys may take an offensive approach towards the client's unpaid bill by sending collection letters, ceasing work on the client's case, initiating collection actions, or filing a small claims action. Attorneys may also act defensively by waiting, or deciding not to pursue the client for payment. Powers, *supra* note 1, at 638.

29. Powers, *supra* note 1, at 637-38 (discussing the alternatives of resolving fee disputes).

30. C.W. WOLFRAM, MODERN LEGAL ETHICS § 9.6.1 (1986) (writing that "[f]ee suits can be ugly affairs").

collect a debt, that attorney may be sourly surprised by the results. One commentator has noted that "it seems plausible to suggest that such [fee] disputes may frequently be triggered by the attorney's demand for payment of his fee and fueled by the attorney's continuing attempts to collect it."³¹ Studies indicate that when an attorney files suit to collect attorney fees,³² "such a suit virtually guarantees a counterclaim for [legal] malpractice."³³ Moreover, litigation between attorneys and clients reflects poorly upon the entire profession.³⁴ Law is a profession offering personal services to clients. No lawyer is likely to argue against the proposition that at least some of their success can be attributed to their own favorable reputation, positive relationships with clients, and potential referral business from others.

At best, litigation impairs the lawyer's potential for referral business from the client that the lawyer sues. At worst, the lawyer can lose the fee dispute, as well as the lawyer's relationship with that client and the people influenced by that client. Furthermore, the lawyer's reputation may suffer, not only in the eyes of prospective clients, but in the eyes of other lawyers. Consider the circumstance where the lawyer is also a court commissioner, an active member of the bar, or participates in some other highly visible role. Since litigation is public, the details surrounding that lawyer's fee dispute will be disclosed to the lawyer's colleagues, and it could result in irreparable damage to the lawyer's position in the profession. Lawyers should also be concerned with the effects of word-of-mouth advertising, especially in smaller towns with intimate legal communities. Of course, a more practical and economical concern is whether the lawyer should represent himself or hire another lawyer. In the end, the litigation costs could exceed the recoverable amount.³⁵

From the client's perspective, litigation is probably as unattractive as it is for the lawyer. "Even finding a local lawyer willing to handle a suit, or testify as an expert witness, against another attorney in a fee case is likely to be difficult."³⁶ However, the *pro se* alternative of a client suing

31. Rau, *supra* note 2, at 2005–06 (citations omitted).

32. *Id.* at 2014.

33. *Id.* at 2017.

34. "Even in the best of scenarios the public relations value of a suit by an attorney against one of his [or her] clients is likely to be very negative." *Id.*

35. WIS. STAT. §814.04(1) (1999–2000) (severely limiting the amount of attorney fees that can be collected in small claims under \$5,000).

36. Arthur W. Francis, Jr., *How to Handle a Legal Malpractice Lawsuit*, L. A. LAW. JUNE, 1989, at 19. From the lawyer's point of view, "it should be kept in mind that the client is

their attorney for legal malpractice gives the lawyer the metaphorical "home field advantage." Presumably, clients hire lawyers to navigate and negotiate the formal legal system for them in the first place. A client's subsequent decision to sue that same lawyer would require the client to enter, now as a player, the same "game" he sought to avoid by hiring the lawyer. This result is ironic, and not particularly practical. Finally, a client must consider the privacy implications of suing his lawyer. Because the ABA Model Rules allow lawyers to use certain "confidential information" to defend against a claim,³⁷ a client might feel inhibited from engaging his former lawyer in formal litigation to protect his privacy.

B. Paying the Bill or Doing Nothing

A client may determine that the best course of action is to simply pay the bill and complain, or take other action. Alternatively, a client may respond to a fee dispute by simply not paying. Assuming those same clients do not want to file a lawsuit against their former lawyer, their best strategy may be to do nothing at all. This option gives clients the ability to forgo offensive action and take a defensive posture. While "[a] client who finds an attorney's fee excessive is likely to grumble and then pay the bill anyway,"³⁸ others simply may not pay. This option could be exercised by waiting for some action from the collecting attorney, or simply ignoring the repeated payment demand letters sent by their former lawyer. However, by exercising this option, the client risks being subjected to a lawsuit or a collection action brought by the collecting attorney.

*C. Complaint to the Office of Lawyer Regulation*³⁹

Theoretically, "the client who has been overcharged may resort to the formal grievance machinery operated by the organized bar" or by the state courts.⁴⁰ In Wisconsin, the Supreme Court Rules created a new lawyer regulation system, the Office of Lawyer Regulation (the OLR), to replace the Board of Attorneys of Professional Responsibility.⁴¹

a person who is willing to sue a prior attorney and would likely have no qualms about suing a second attorney." *Id.* at 20.

37. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (2001).

38. Rau, *supra* note 2, at 2008.

39. See generally WIS. SUP. CT. R. 21.001–21.

40. See Rau, *supra* note 2, at 2009.

41. In Wisconsin, the OLR is responsible for "receiv[ing] and respond[ing] to inquiries and grievances relating to attorneys licensed to practice law . . . in Wisconsin and . . . is

Chapters 21 and 22 of the Supreme Court Rules, which describe the system for regulating the practice of law in Wisconsin, were redrafted at the request of the Wisconsin Supreme Court justices after they reached agreement in January 2000 on a tentative framework for lawyer discipline.⁴² The new framework was approved on May 22, 2000.⁴³ The OLR screens, investigates, and prosecutes cases.⁴⁴ The Central Intake Unit of the OLR takes calls from the public, conducts initial investigations, and determines how to proceed.⁴⁵ This may include a referral for full investigation, a referral to the new Alternatives to Discipline program, or dismissal.⁴⁶ The District Investigative Committee assists in the investigation of certain cases and ensures uniformity across the state.⁴⁷ The Preliminary Review Committee reviews investigations and determines whether there is cause for the director to file a complaint with the Wisconsin Supreme Court.⁴⁸ A court appointed attorney or reserve judge (referee) hears cases, makes disciplinary recommendations to the supreme court, and approves the issuance of private and public reprimands.⁴⁹ The Board of Administrative Oversight monitors the fairness, effectiveness, and efficiency of the system and proposes substantive and procedural rules for consideration by the supreme court.⁵⁰

Recourse to the OLR may be an effective option for a disgruntled client as "no attorney threatened with a fee-based complaint can completely ignore the existence of the bar's [or state's] grievance

responsible for the prosecution of disciplinary proceedings alleging attorney misconduct." WIS. SUP. CT. R. 21.02. District investigation committees can "resolve or adjust . . . a dispute between an attorney and a client or other attorney if the dispute does not involve misconduct." *Id.* R. 21.06. The OLR "do[es] not represent the complaining person, the attorney[,] . . . the bar generally, or any other person or group." *Id.* R. 21.12. Instead, it "represent[s] the interests of the [Wisconsin] [S]upreme [C]ourt and the public in the integrity of the lawyer regulation system." *Id.*

42. *Office of Lawyer Regulation-Synopsis*, available at <http://www.courts.state.wi.us> (last modified Oct. 25, 2001). (The rules and related documents are available on the Website or by calling the Clerk of the Wisconsin Supreme Court at (608) 266-1880.)

43. *Id.*

44. *Id.*; see also WIS. SUP. CT. R. 21 (governing "Enforcement of Attorney's Professional Responsibility").

45. See *Supreme Court Adopts Alternatives to Discipline Program*, available at <http://www.courts.state.wi.us/media/press/intake1.html> (last visited Feb. 24, 2002).

46. *Id.*

47. *The Office of Lawyer Regulation System*, available at <http://www.courts.state.wi.us/olr/synopsis2.htm> (last visited Feb. 24, 2002).

48. *Id.*

49. *Id.*

50. *Id.*

machinery or the possibility of formal hearings and an adverse finding."⁵¹ Lawyers must take seriously any allegations made by a client, especially those that could result in a disciplinary investigation, hearing, or sanction. Defending such allegations is likely to be costly, time consuming, and risky. More importantly, relationships usually suffer and unintended consequences may develop beyond the scope of the complaint itself.

"The overwhelming majority of attorney disciplinary proceedings are in fact triggered by client complaints,"⁵² and in fact, "the primary source of disciplinary caseload is third-party complaints."⁵³ Although a client complaint is not always the correct forum for a fee dispute, it can be a useful option for the client who also alleges that the attorney committed ethical violations. Nevertheless, "[a]s a practical matter, disciplinary action against an attorney who has charged an 'excessive fee' is imposed in only the most blatant cases of abuse."⁵⁴ Therefore, in all but the most egregious cases, an attorney will likely be able to avoid disciplinary action for their conduct relating to fee disputes.⁵⁵

D. Negotiation

Clients can also decide to initiate negotiation over the disputed fee. However, in many instances, clients may hesitate to enter into negotiations concerning fee disputes due to the unequal bargaining power between attorney and client.⁵⁶ Since an attorney is expected to have more negotiation expertise, a client may feel that they are confronted with having to face an expert at the negotiation table. A client may seek to have an attorney represent them in the negotiation, but similar to litigation, obtaining representation can become a major obstacle for a client.⁵⁷

Despite the imbalance in bargaining power, negotiation is probably the most popular method of resolving disputes between attorneys and

51. See Rau, *supra* note 2, at 2014.

52. See *id.* at 2009–10.

53. Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 919, 946.

54. Rau, *supra* note 2, at 2012.

55. *Id.*

56. See *id.* at 2018–20; see also Powers, *supra* note 1, at 629–32 (discussing disparate bargaining positions between attorneys and clients as one argument militating against the use of ADR in fee disputes); Clark, *supra* note 26, at 850–51 (discussing the disparity in bargaining power between attorneys and clients in the context of pre-dispute agreements).

57. See generally Francis, *supra* note 36.

their clients.⁵⁸ One empirical study⁵⁹ reported how attorneys resolved fee disputes and suggested that attorneys and clients prefer to negotiate a resolution. Of those surveyed, "73.6 percent reported that in 'all' or 'most' cases [of fee disputes,] they had 'reach[ed]' a final agreement on the disputed fees after discussion and negotiation with the client."⁶⁰ When negotiation failed, 69.3 percent of responding attorneys reported that they took no further action to collect the unpaid fee.⁶¹ This study suggests that even though the bargaining power may favor the attorney, most attorneys will have the incentive to reach a settlement with the client because the option to litigate has too many negative consequences. However, reaching resolution may be even more likely if a third party is allowed to facilitate the negotiation, such as in mediation.

E. Mediation

"Mediation is negotiation carried out with the assistance of a third party."⁶² It is a voluntary process where the mediator "has no power to impose an outcome on disputing parties."⁶³ Instead, mediators attempt to help the parties reach their own solution by employing a variety of techniques to change the dynamics of the negotiation.⁶⁴ Mediators work as a guide, leading negotiators through the formal mediation process and towards a resolution.⁶⁵

Generally, mediation is not a controversial process unless participation is mandatory, which in many ways contradicts the accepted definition of mediation as a voluntary process. Although attendance at mediation is not usually mandatory, some courts encourage litigants to

58. See Rau, *supra* note 2, at 2019.

59. *Id.* The study included a total sample of 3379 Texas law firms, drawn from the database of law firms in IOLTA (Interest On Lawyer's Trust Account) records. *Id.* at 2007 n.2. "All of the firms in the database with two or more attorneys were surveyed." *Id.* The remainder of the sample (approximately 42%) consisted of solo practitioners. *Id.* "1,794 responses were received for an overall response rate of 53%." *Id.*

60. *Id.* at 2019.

61. *Id.*

62. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 123 (3d ed. 1999).

63. *Id.*

64. *Id.*

65. *Id.* Various negotiating techniques that are often used by the parties during the mediation session are outlined in the popular book *Getting to Yes*. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

use the free or low cost mediation services that are available during the early stages of litigation.⁶⁶ In some jurisdictions, the courts sponsor mediation,⁶⁷ while in others, courts mandate mediation and other forms of ADR.⁶⁸ In Wisconsin, for example, "a judge may . . . order the parties to select a settlement alternative," which may "include a requirement that the parties participate personally in the settlement alternative."⁶⁹ Court-mandated ADR can pave the road to settlement. However, true to the definition of mediation, mediated outcomes or agreements are still reached voluntarily, even in situations where attendance and participation is mandatory.

Of course, attorneys and clients can instead choose to use private mediators. However, even if both parties choose private mediation, they still need to agree on who will serve as the mediator and who will pay for the services.⁷⁰ Unfortunately, even these simple decisions require some degree of negotiation, which may or may not inhibit parties from getting to the table. Therefore, agreeing to mediate through a pre-dispute agreement could address who will pay for the mediation and how a mediator will be chosen.

66. DISPUTE RESOLUTION AND LAWYERS: ABRIDGED EDITION 178 (Leonard L. Riskin & James E. Westbrook eds., 1998).

67. In Wisconsin, the small claims courts in Milwaukee County and Waukesha County have a voluntary mediation program available to litigants. These are only two of the many court-sponsored mediation programs available throughout the country. Programs can and do differ. For example, in Milwaukee County, litigants represented by attorneys are allowed free access to the mediation program. Law students who are enrolled for credit in the Mediation Clinic conduct the mediations in the Milwaukee program. Professor Janine Geske, former Wisconsin Supreme Court Justice, and volunteer practitioners supervise the student mediators. In Waukesha County, volunteer practitioners conduct the mediation program, which is open only to litigants appearing *pro se*. See *Alternative Dispute Resolution*, at <http://www.law.mu.edu/adr/index.html> (last visited Feb. 28, 2002) (discussing the alternative dispute resolution programs available to Marquette law students).

68. See generally GOLDBERG ET AL., *supra* note 62, at 365–404.

69. WIS. STAT. § 802.12 (1999–2000). The statute provides in relevant part:

(2)(a) A judge may, with or without a motion having been filed, upon determining that an action or proceeding is an appropriate one in which to invoke a settlement alternative, order the parties to select a settlement alternative as a means to attempt settlement. An order under this paragraph may include a requirement that the parties participate personally in the settlement alternative. Any party aggrieved by an order under this paragraph shall be afforded a hearing to show cause why the order should be vacated or modified. Unless all of the parties consent, an order under this paragraph shall not delay the setting of the trial date, discovery proceedings, trial or other matters addressed in the scheduling order or conference.

Id.

70. DISPUTE RESOLUTION AND LAWYERS: ABRIDGED EDITION, *supra* note 66, at 178.

Because mediation does not impose an outcome on either party, it offers both parties the freedom to provide input and chart their own course toward a resolution. This avoids the uncertainty, costs, risks, and other disadvantages associated with arbitration and litigation. When attempted, mediation can often mend, or prevent further damage to, the relationship between the attorney and client. Thus, mediation may be a logical first step for both parties.

F. Arbitration and Pre-Dispute Agreements

"Arbitration has been an alternative to litigation for hundreds of years,"⁷¹ and it is widely used. Arbitrations are "private resolution procedure[s]" and therefore can have various elements, and be conducted in different fashions.⁷² Of the ADR methods, arbitration is the one that most closely resembles court adjudication because "proofs and arguments are submitted to a neutral third party."⁷³

Arbitration is used to resolve a variety of disputes arising in the following contexts: construction trade, between consumers and manufacturers, between family members, in medical malpractice, in the securities context, in matters related to civil rights, between communities and their members, within professional sports, and between attorneys and clients.⁷⁴ Additionally, "95 percent of all collective bargaining contracts contain a provision for final and binding arbitration."⁷⁵ In each of these contexts, the individual voluntarily waives the right to a jury trial to secure more immediate benefits under the contract.

Agreements made between attorneys and clients are no exception. A client may voluntarily waive her right to a jury trial in the event that there is a fee dispute in order to obtain the more immediate benefit of representation by the contracting attorney under a contingency fee. Various commentators criticize the use of such agreements, arguing that in many cases the client does not have the opportunity to bargain for the pre-dispute agreement.⁷⁶ Therefore, the issue of bargaining power may be relevant to a court considering the enforceability of a pre-dispute provision. When properly bargained for, however, arbitration can be

71. See GOLDBERG ET AL., *supra* note 62, at 233.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See, e.g., Clark, *supra* note 26, at 850.

effectively used to resolve attorney-client disputes.

A mandatory arbitration clause could also be an early step employed by attorneys and their clients.⁷⁷ Arbitration clauses are written into a variety of contracts, including international contracts, consumer contracts, employment contracts, service contracts, and professional and personal service contracts.⁷⁸ Some attorneys have attempted to incorporate arbitration clauses into retainer agreements.⁷⁹ Such agreements are often referred to as "pre-dispute agreements."⁸⁰

However, attorneys must exercise great care when utilizing pre-dispute agreements. The enforceability of such agreements rests upon whether the client gave informed and voluntary consent to the provision.⁸¹ The courts are reluctant to uphold an attorney's petition to compel arbitration unless the court believes that the client clearly waived the right to a jury trial.⁸² As the California Court of Appeals stated, "[T]here is nothing inherently improper about an arbitration agreement between a lawyer and client which extends to malpractice claims, [but the client must be] fully advised of the possible consequences of that agreement."⁸³ Unfortunately, "it appears pre-dispute agreements to arbitrate malpractice claims do not have much support in the law."⁸⁴ The law may disfavor pre-dispute agreements requiring clients to arbitrate fee disputes in part because once the arbitration outcome is final, it is not subject to judicial review.⁸⁵ This

77. *Id.* at 841.

78. Rau, *supra* note 2, at 2024-27.

79. Clark, *supra* note 26, at 852.

80. *Id.* at 841.

81. *Id.* at 844 (raising the issue of the protection needed to ensure that the decision to arbitrate a fee dispute is informed and voluntary, and reinforces the importance of the attorney's fiduciary duty to advance and protect the client's best interest).

82. *Id.* at 853 ("[L]egal analysts read [*Lawrence v. Walzer & Gabrielson*] as 'implicitly approving a properly drafted arbitration agreement,' so long as an agreement is clear as to its scope and properly discloses to the client that arbitration involves the loss of the right to a trial by jury.").

83. *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6, 10 (Ct. App. 1989) (quoting Cal. Compendium on Prof'l Responsibility, pt. IIA, Formal Op. 1977-47, p. 1).

84. John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 991 (1995) (stating that "[t]he two issues at the heart of every fee arbitration procedure are whether attorneys and clients can agree to submit fee disputes to arbitration before the dispute arises, and whether the arbitration may consider malpractice issues").

85. Clark, *supra* note 26, at 839 ("[M]ost arbitration decisions are binding and not subject to review."); Brickman, *supra* note 27, at 294 ("[T]he substance of arbitration awards is generally not reviewable.").

means that in most cases, the client forfeits the opportunity to seek any kind of judicial relief. Although arbitration itself can be useful, attorneys should carefully implement pre-dispute agreements.

1. History of Arbitration of Attorney-Client Disputes

"Until the last decade, arbitration has not, however, made significant inroads in resolving disputes between attorneys and clients."⁸⁶ Recently, however, arbitration has gained more attention as being a possible, if not the preferred, method of resolving disputes between attorneys and clients.⁸⁷ As one author explained, "the proliferation of attorney-client disputes has changed the profession's perspective towards the use of [ADR]. The major shift in the profession has been the push towards the use of arbitration in resolving attorney-client fee disputes."⁸⁸ Nevertheless, the trend towards using arbitration is controversial. Most of the controversy revolves around whether a client, or attorney, should be forced to waive their right to a jury trial by agreeing to mandatory arbitration.⁸⁹ Many question whether it is tolerable under any circumstances that a party should be denied the right to a jury trial.⁹⁰ Despite this controversy, most courts uphold a party's right to agree to mandatory arbitration.⁹¹

2. Arbitration and Claims of Legal Malpractice

Disputes over fees and legal malpractice are often interrelated.⁹² Often, fee disputes flow from a client's belief that the attorney engaged in some type of legal malpractice. Withholding fees is sometimes an informal way for a client to make a malpractice-like claim against an

86. Dzienkowski, *supra* note 84, at 989.

87. *Id.* at 990.

88. *Id.*

89. Clark, *supra* note 26, at 838-39 ("[T]he most critical safeguard forfeited by a party who opts for arbitration over litigation is the loss of the right to a trial by jury.").

90. However, some have questioned whether a right to a jury trial necessarily exists even in absence of an agreement to arbitrate. *In re Application of LiVolsi*, 428 A.2d 1268, 1273-75 (N.J. 1981); see also M. David LeBrun, Annotation, *Validity of Statute or Rule Providing for Arbitration of Fee Disputes Between Attorneys and their Clients*, 17 A.L.R. 4th 993 (1982 & Supp. 2001).

91. See Rau, *supra* note 2, at 2025-26 ("While the traditional attitude of judges towards arbitration was one of considerable hostility, statutes enacted in most jurisdictions have completely reversed the common-law position on arbitration and have made executory agreements to arbitrate enforceable.").

92. See Powers, *supra* note 1, at 638-39 (explaining that fee disputes and legal malpractice issues are often interrelated).

attorney. In many cases, clients may lack the necessary skills to analyze whether the attorney has in fact committed malpractice.⁹³ For this reason, clients may be hesitant to bring a formal malpractice claim against an attorney, even though the services the attorney provided appear wholly inadequate to the client.

The interplay between fee dispute arbitration and malpractice was the subject of the New Jersey Supreme Court case of *Saffer v. Willoughby*.⁹⁴ In *Saffer*, a disgruntled client refused to pay fees to his lawyer and alleged legal malpractice against him.⁹⁵ The issue of whether the client was liable to his attorney for legal fees went to arbitration according to the terms of the fee agreement between the client and his attorney.⁹⁶ The malpractice claim, however, was filed in the trial court.⁹⁷ The attorney was successful at arbitration, but the court stayed the arbitration award pending the outcome of the malpractice suit.⁹⁸ The court recognized that arbitration was better suited to address issues related to fee disputes, not malpractice.⁹⁹ Even though a final decision was issued in the arbitration, the practical outcome of the arbitration decision hinged on the outcome of the malpractice action pending in the courts.

The attorney relied on arbitration to resolve his fee dispute, but the court made the outcome of the arbitration contingent upon there being no legal finding of malpractice on the part of the attorney.¹⁰⁰ According to one commentator, "From the client's point of view, the court's decision applied common sense."¹⁰¹ To have the outcome of one impact the other, even though the two are decided in completely different forums, makes the resolution of such claims needlessly complex and inserts a great deal of uncertainty between attorneys and clients as to how fee disputes will eventually be resolved. In addition, the approach adopted in *Saffer* involved two separate actions, one for legal malpractice, and another for the fee dispute. Conducting two separate

93. See generally Reed, *supra* note 3, at 522.

94. 670 A.2d 527 (N.J. 1996).

95. *Id.* at 529.

96. *Id.*

97. *Id.*

98. *Id.* at 533.

99. *Id.* at 531.

100. *Id.* at 534.

101. Reed, *supra* note 3, at 524 (discussing the interplay between fee disputes and legal malpractice when a court stays an arbitration award pending the outcome of a malpractice case in court).

proceedings when the two might easily be resolved together seems wasteful and more costly than necessary. Thus, *Saffer* clearly illustrates a need to design a system that can effectively deal with the resolution of fee disputes *and* legal malpractice.

IV. MANDATORY ARBITRATION FOR FEE DISPUTES?

Currently, eight states require lawyers to participate in mandatory fee arbitration,¹⁰² and in some states, the bar associations and the courts sponsor voluntary fee arbitration programs.¹⁰³ While the ABA Model Rules encourage lawyers to use such programs,¹⁰⁴ not all lawyers have embraced arbitration.

Wisconsin does not currently require lawyers to participate in mandatory arbitration for fee disputes; however, in March 2000, there was a push for mandatory arbitration. Mandatory fee arbitration would require an attorney engaged in a fee dispute with his or her client to submit to arbitration at the request of the client.¹⁰⁵ One Wisconsin lawyer, Gerald Sternberg, petitioned the Wisconsin Supreme Court to adopt his proposal to require all Wisconsin lawyers to submit to mandatory fee arbitration.¹⁰⁶ The Wisconsin Supreme Court, however, denied the petition¹⁰⁷ and instead called for a study of mandatory fee arbitration.¹⁰⁸ Wisconsin state statutes still do not require attorneys to submit to arbitration or mediation procedures established by the state

102. *Mandatory Fee Arbitration*, 13 THE COMPLEAT LAW., Spring 1996, at 10 (reporting that nine states and the District of Columbia have mandatory fee arbitration rules).

103. The Milwaukee Bar Association and the Wisconsin Bar Association both have voluntary fee dispute programs. See *Resolution of Fee Disputes Committee*, available at <http://www.wisbar.org/committees/caz00/index.html> (last visited Feb. 25, 2002); *MBE Fee Arbitration Program*, available at <http://www.milwbar.org/public/FeeArb.html> (last visited Feb. 25, 2002).

104. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. (2001). "If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it." *Id.*

105. *In the Matter of the Petition to Create a Fee Arbitration System*, Amended Order No. 00-15, WIS. SUP. CT. R. Ch. 14 (Proposed Draft, Apr. 6, 2001), available at <http://www.wisbar.org/committees/caz00/farbres.html>.

106. *Court Considers Mandatory Fee Arbitration*, INSIDE THE BAR (State Bar of Wisconsin, Madison, Wisconsin) (Feb. 2001), available at <http://www.wisbar.org/newsletter/2001/02/cmfa.html> (last visited Feb. 14, 2002).

107. *Court Denies Petition, Calls for Study of Mandatory Fee Arbitration*, WIS. LAW., Apr. 2001, at 9.

108. *Id.*; see also *Supreme Court Seeks Volunteers to Study Fee Arbitration*, available at <http://www.wisbar.org/newscenter/gennews/2001/scsvts.html> (last visited Jan. 26, 2002).

bar, but Wisconsin judges can refer fee dispute litigants to ADR.¹⁰⁹

Two competing views have emerged on this subject. Supporters of using mandatory fee arbitration to resolve attorney client fee disputes argue that litigation only works "to engender bitterness [towards lawyers] and a plethora of malpractice counterclaims."¹¹⁰ According to this logic, "[t]he ethical, competent attorney has nothing to fear by submitting to a fee arbitration forum."¹¹¹ Opponents of mandatory fee arbitration, however, are concerned that such a system potentially violates an individual's constitutional right to a jury trial under the Seventh Amendment.¹¹²

The Wisconsin Bar Committee on the Resolution of Fee Disputes published Fee Arbitration Rules and recommended that the bar support, in principle, the concept of mandatory arbitration.¹¹³ The Committee, however, opposed Sternberg's petition because it found certain procedural problems with the petition's proposal.¹¹⁴ Instead, the Committee suggested that "the State Bar's existing program be revised as a mandatory program."¹¹⁵ In response to the committee

109. WIS. STAT. § 802.12(2)(a) (1999-2000). This statute states in part: "A judge may, with or without a motion having been filed, upon determining that an action or proceeding is an appropriate one in which to invoke a settlement alternative, order parties to select a settlement alternative as a means to attempt settlement." *Id.*

110. Byron D. Brown, *Restoring Faith in the Attorney/Client Relationship: Alaska's Mandatory Fee Arbitration*, 1998 J. DISP. RESOL. 95, 103 (discussing Alaska's mandatory fee arbitration rule).

111. *Id.*

112. LeBrun, *supra* note 90.

113. *Draft Report of the Committee on the Resolution of Fee Disputes*, available at <http://www.wisbar.org/committees/caz00/crespet.html> (last visited Feb. 25, 2002) [hereinafter *Draft Report*].

114. *Id.*

115. *Id.* Commenting on its jurisdiction in fee disputes the committee has stated:

[t]he pendency of a lawsuit shall deprive the committee of jurisdiction over a dispute unless a court requests the involvement of the committee and parties sign the agreement for binding arbitration. It shall be the duty of the committee to encourage the amicable resolution of fee disputes falling within its jurisdiction and, in the event such resolution is not achieved, to arbitrate and finally determine such disputes.

Committee on the Resolution of Fee Disputes: Fee Arbitration Rules, available at <http://www.wisbar.org/bar/feearbrules.html> (last visited Feb. 25, 2002) [hereinafter *Committee on the Resolution of Fee Disputes: Fee Arbitration Rules*]. See also *Court denies petition, Calls for Study of Mandatory Fee Arbitration*, available at <http://www.wisbar.org/committees/caz00/cdpc01.html> (last visited Feb. 25, 2002) [hereinafter *Study of Mandatory Fee Arbitration*]. The Wisconsin State Bar opposed Sternberg's petition:

recommendations, the Wisconsin Supreme Court sought volunteers to study mandatory fee arbitration.¹¹⁶

This growing support suggests a trend is underway towards mandating the use of arbitration in fee disputes.¹¹⁷ Wisconsin is just one example. Other states already use mandatory fee arbitration as a means of resolving fee disputes.¹¹⁸ One article about Alaska's approach suggests that mandatory-fee arbitration restores faith in the attorney-client relationship.¹¹⁹ The Alaska Supreme Court ruled that state courts could determine procedures for resolving fee disputes.¹²⁰ Alaska state bar rules have been praised as being effective and efficient. Alaska even includes lay people on the hearing panels.¹²¹ Similarly, Wisconsin also invites non-lawyers to serve on lawyer regulation committees.

There are many arguments in support of mandatory fee dispute resolution, as well as many against it.¹²² Proponents argue that the

State Bar President-elect Gerlad Mowris told the court that the Board of Governors unanimously opposed the petition but supported the study of mandatory fee arbitration in specific cases. Mowris said that if the court determines that there is a demonstrated need, the State Bar would like to be involved in designing a workable solution.

Id.

116. *Study of Mandatory Fee Arbitration*, *supra* note 115. The following response was elicited from one supreme court justice regarding the decision to study mandatory arbitration of fee disputes:

In the open conference following the hearing, Justice Patrick Crooks said that the courts' decision to study mandatory fee arbitration is not a criticism of what current volunteers—lawyers and public members—are doing. Justice Jon Wilcox agreed. "Things are working, and if there is a glitch, we'll find it and fix it."

Id.

117. James Peterson, *Fee Arbitration: An Effective Alternative to Litigation*, WIS. LAW., Aug. 1994, at 17.

118. Brown, *supra* note 110, at 97 ("The Alaska Supreme Court followed the ABA's recommendations, and by order, the court established a mandatory fee arbitration system in 1974.").

119. *See generally id.* at 95.

120. J. Catherine Bramlage et al., *Year in Review: Alaska Supreme Court and Court of Appeals Year in Review 1996*, 14 ALASKA L. REV. 165, 189–90 (1997).

121. *Id.*; *see also* ALASKA BAR R. 34(a), 37(c), available at <http://www.alaskabar.org/library/allbarrules.pdf> (last visited Feb. 25, 2002).

122. *Draft Report*, *supra* note 113. The report concludes:

Reasons cited in favor of mandatory fee arbitration

Improve communications with clients and take the fee dispute out of the home ground of the attorney, good public relations, lawyers in general lose control of the process, jury trial is overstated

Reasons cited in opposition

profession would benefit from better public relations if there was a requirement for fee dispute arbitrations.¹²³ Specifically, proponents argue that if arbitration of fee disputes was required, the public would have the perception that lawyers no longer control the process of resolving fee disputes. Finally, many proponents argue that the right to a jury trial is overstated.¹²⁴

Most of the opposition to mandatory arbitration concerns the denial of a jury trial for clients involved in a fee dispute.¹²⁵ Additionally, opponents argue that mandatory arbitration of fee disputes could lead to an increase in frivolous challenges to legal fees, and consequently result in a decrease in affordable legal services.¹²⁶ Another argument against mandatory fee arbitration is that it does little to change the public's perception that lawyers will protect each other.¹²⁷

Opponents to a statutory requirement argue that if fee arbitration were mandated, lawyers should not be the only professionals to be impacted.¹²⁸ Donald Victor Kozlovsky, a Wisconsin lawyer, captured the essence of the controversy best when he said, "Just as it is offensive to many to bind a client to mandatory fee arbitration via a retainer [pre-dispute] agreement provision, so too is it offensive to many to so bind a lawyer via a mandate from the Wisconsin Supreme Court."¹²⁹ According to the report, opponents suggest that mediation should be required as an

Deprives jury trial, may increase frivolous challenges to fees, why only lawyers?, may increase costs and decrease affordable legal services, opposition to mandates, require fee mediation instead, must bind both parties, may further alienate clients

Recommendations

Support in principle the concept of mandatory arbitration, oppose Sternberg's petition, current program should be the basis for any mandatory program.

Id.

123. *Id.*

124. *Id.*

125. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

126. *Draft Report, supra* note 113.

127. As a real estate broker, the author has served on many fee arbitration panels charged with hearing and settling disputes between cooperating Realtors®, and between Realtors® and their clients. Oddly, although public perception might indicate that Realtors® protect each other in these mandatory arbitrations, the author has found that to be false. In fact, the arbitration panels (and ethics hearing panels) that he has served on and experienced seem to be much more strict about enforcing the rules against each other. Like law, organized real estate is largely self-regulated.

128. *Draft Report, supra* note 113.

129. Donald V. Kozlovsky, *The Case for Voluntary Fee Arbitration*, available at <http://www.wisbar.org/committees/caz00/cvfa.html> (last visited Jan. 26, 2002).

alternative.¹³⁰

V. COMPARISONS TO OTHER STATES, COUNTRIES, AND PROFESSIONS

Alaska,¹³¹ California,¹³² Maine,¹³³ New Jersey,¹³⁴ New York,¹³⁵ North Carolina,¹³⁶ South Carolina,¹³⁷ and Wyoming¹³⁸ all have mandatory fee arbitration programs. Georgia, Montana, Nevada, Tennessee, and Washington are investigating the use of such programs.¹³⁹ Although the programs differ from each other in some respects, all of the states have a similar approach for the resolution of fee disputes. However, in countries such as the United Kingdom and Australia, fee disputes are settled much differently.

A. Comparison to the United Kingdom

In the United Kingdom, "There are two ways [a client] may be able to have [a solicitor's] bill checked to see if it is fair and reasonable."¹⁴⁰ One way is through "the *remuneration certificate* procedure[,] [which] is a free service."¹⁴¹ If a client thinks a bill is too high, he is encouraged to contact the solicitor as soon as possible.¹⁴² If the client and solicitor cannot come to an agreement about the fee, the client must write a letter to the solicitor requesting a remuneration certificate.¹⁴³ Strict time limits apply to this process.¹⁴⁴ The law society seeks to "complete 85% of remuneration certificate applications within three months, 95% within six months and the remaining 5% within twelve months."¹⁴⁵ A

130. *Draft Report*, *supra* note 113.

131. ALASKA BAR R. 40.

132. CAL. BAR. R., MANDATORY FEE. ARB. GUIDELINES § II.

133. ME. R. BAR R. 9.

134. N.J. CT. R. 1:20A-3.

135. N.Y. STANDARDS & ADMIN. POL'Y § 137.6.

136. N.C. BAR R. SUBCHAP. 1B, § .0209.

137. S.C. APP. CT. R. 416, 2.

138. WYO. FEE DISP. RESOL. R. 6.

139. *Mandatory Fee Arbitration*, *supra* note 102, at 10.

140. *How Do I Get My Bill Checked?*, available at http://www.lawsociety.co.uk/dcs/fourth_tier.asp?section_id=3687 (last visited Jan. 31, 2002). In the United Kingdom, a solicitor is a lawyer that practices law outside of the courtroom. *Id.* Conversely, a barrister is a lawyer that appears in court. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

client can also request an *assessment*, a process by which the bill is assessed by the courts.¹⁴⁶ Assessments may also force clients to incur additional court costs.¹⁴⁷ Strict time limits apply, requiring application within one to twelve months.¹⁴⁸

Although both methods offer clients assistance when disputing fees, the law society in England suggests that clients seek representation by another solicitor.¹⁴⁹ This raises the same issues inherent in our current system. The system does appear to have a procedure in place that fosters conciliation early in the process. The law society offers comprehensive suggestions, not only for handling complaints, but also for setting up model complaint procedures in law offices.¹⁵⁰

B. Comparison to Australia

The Australian State of New South Wales classifies fee disputes as consumer disputes and uses an *assessment*, similar to the United Kingdom.¹⁵¹ Clients who feel that they have been overcharged "have a right to have [their] bill assessed by an independent lawyer, appointed by the Supreme Court, skilled in the area of legal work done."¹⁵² The assessment process is conducted like a court case, but in writing and without the need to go to court.¹⁵³ The assigned lawyer may decline to assess the bill if the parties "entered into a valid costs agreement . . . and [the] costs agreement states the amount of costs [the] solicitor will charge," which may or may not preclude some clients from filing complaints.¹⁵⁴ The application fee for assessment is payable to the supreme court.¹⁵⁵ The fee is \$100 AUD,¹⁵⁶ or 1%, of the amount unpaid or in dispute, "whichever is more."¹⁵⁷

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Professional Responsibilities and Regulation: Solicitors' Fees*, available at http://www.lawsocnsw.asn.au/profreg/solicitors_fees.html (last visited Jan. 26, 2002).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. AUD stands for Australian Dollars. The current exchange rate would make the value about \$52 United States dollars. See *ExchangeRate.com*, at http://www.exchangerate.com/quick_calculator.html?amount_from=100.00&calc_short_from_iso=AUD&calc_short_to_iso=USD&Submit=Convert (last visited Mar. 4, 2002).

157. *Professional Responsibilities and Regulation: Solicitors' Fees*, *supra* note 151.

The law society of New South Wales makes information available about Solicitor's Fees and "Professional Responsibilities and Regulation" on its website.¹⁵⁸ Mediation is also available for disgruntled clients.¹⁵⁹ They can file a complaint with the Office of the Legal Services Commissioner, but not as a "proper way to obtain an independent assessment of a lawyer's costs."¹⁶⁰ The Family Court has different rules with regard to legal costs, and a variety of other resources are available through the legal system in Australia.¹⁶¹ Although an in-depth analysis of these resources is beyond the scope of this discussion, the Australian legal system model could be considered as one way to benefit American clients and lawyers. The use of assessments appears to be fair, effective, and efficient.

C. Comparison to Realtors

In the real estate profession, Realtors®, by virtue of their membership in a trade association, are mandated to participate in binding arbitration.¹⁶² The National Association of Realtors'® Code of Ethics requires members to arbitrate disputes between each other.¹⁶³ It also obligates members to arbitrate disputes when non-member customers or clients initiate arbitration,¹⁶⁴ unless all parties opt out in writing,¹⁶⁵ or if the Realtor® is acting as a principal in the transaction.¹⁶⁶

158. *Id.*

159. *Id.*

160. *Id.*

161. See generally Susan Pattison, *Costs Agreements in the Family Court*, LAW SOC'Y J., Oct. 1995, at 22, available at http://www.lawsocnsw.asn.au/resources/lsj/archive/oct1995/22_1.html.

162. *Code of Ethics and Standards of Practice of the National Association of Realtors*, available at <http://www.kaarmls.com/coe.htm> (last visited Jan. 26, 2002). Article 17 provides:

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between Realtors associated with different firms, arising out of their relationship as Realtors, the Realtors shall submit the dispute to arbitration in accordance with the regulation of their Board or Boards rather than litigate the matter. In the event clients of Realtors wish to arbitrate contractual disputes arising out of real estate transactions, Realtors shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision.

Id.

163. *Id.*

164. *Id.*

165. *Id.* at 17-2. "Article 17 does not require Realtors to arbitrate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to arbitrate before the Board." *Id.*

Moreover, "The filing of litigation and refusal to withdraw from it by Realtors in an arbitrable matter constitutes a refusal to arbitrate."¹⁶⁷

In the spirit of the landmark *Gilmer v. Interstate/Johnson Lane Corp.* case,¹⁶⁸ states such as Wisconsin enforce written arbitration agreements.¹⁶⁹ Such agreements are "presumptively valid" unless "invalidity is shown by clear and convincing evidence."¹⁷⁰ Specifically related to real estate brokers, even those who are not Realtor® members, a Wisconsin statute makes agreements to arbitrate real estate transaction disputes binding and enforceable:

A provision in any written agreement between a purchaser or seller of real estate and a real estate broker, or between a purchaser and seller of real estate, to submit to arbitration any controversy between them arising out of the real estate transaction is valid, irrevocable and enforceable except upon any grounds that exist at law or in equity for the revocation of any agreement.¹⁷¹

Statutes like this make it clear that pre-dispute arbitration clauses will be held valid, irrevocable, and enforceable unless revoked by the court. Thus, pre-dispute agreements may be a viable method of preventing and resolving fee-disputes.¹⁷²

VI. FRAMEWORK FOR A NEW PLAN

Any formal process implemented to resolve disputes between attorneys and clients should assist both parties, not inhibit them. One author's plan suggests that we "Scrap the Disciplinary 'Enforcement'

166. *Id.* at 17-3. "Realtors, when acting solely as principals in a real estate transaction, are not obligated to arbitrate disputes with other Realtors absent a specific written agreement to the contrary." *Id.*

167. *Id.* at 17-1.

168. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that the compulsory nature of a pre-dispute arbitration agreement does not render the agreement unenforceable on grounds of coercion or not being voluntary).

169. *Gerl v. Steans*, No. 95-2602 (Wis. Ct. App. May 29, 1996) (noting that when the client submitted the fee dispute to arbitration, "Arbitrators found that the clause regarding costs and disbursements was ambiguous," but since the client "did not object, she implicitly agreed to [the attorney's] interpretation of the agreement.").

170. *Milwaukee Bd. of Sch. Dists. v. Milwaukee Teachers' Educ. Ass'n*, 287 N.W.2d 131, 135 (Wis. 1980).

171. WIS. STAT. § 788.015 (1999-2000).

172. *Dzienkowski*, *supra* note 84, at 989. See generally *Clark*, *supra* note 26 (discussing in detail the use of pre-dispute agreements).

Model [and] Treat Lawyering Like Any Other Business" and that "Legal Malpractice is the Most Effective Form of Lawyer Regulation."¹⁷³

A new plan should utilize arguments on both sides of the issue and take into consideration the client's perspective. Plan developers should also consider a variety of factors such as: public perception, public trust, the right to a jury trial, ADR methods, agency law, law and economics efficiency theory,¹⁷⁴ current and proposed *Restatements (Third) of Law Governing Lawyers*,¹⁷⁵ *Restatements (Second) of Agency*,¹⁷⁶ rules and programs currently in use,¹⁷⁷ and programs used in other similar situations, such as the EEOC model of resolving discrimination complaints.¹⁷⁸

An overall plan to handle fee disputes in the future might look like this:

1. Create a multidisciplinary summit team or committee to brainstorm ideas.

Lawyers. This category could include representatives from various areas of law and specialties including: a litigation attorney, an ADR specialist, a supervising attorney, a state agency specialist, a former

173. Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2591, 2600 (1996).

174. *Developments in the Law: Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1674 (1994). This article concludes that "the threat of too much liability might reduce the activity level of competent attorneys to inefficient levels." *Id.* "In addition, economically efficient liability shifting devices might be unfair or unethical. Lawmakers and courts considering lawyer's responses to liability should weigh carefully the effects of their decisions in reaching the proper balance of interests." *Id.*

175. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996). The following sections of this *Restatement* are also pertinent: Duty of Care to Clients § 72 (Tentative Draft Mar. 21, 1995), Standard of Care § 74 (Tentative Draft Apr. 7, 1994), Causation and Damages § 75 (Final Proposal Apr. 6, 1998), and Civil Liability to Client Other than for Malpractice § 76 (Tentative Draft Mar. 21, 1997).

176. RESTATEMENT (SECOND) OF AGENCY § 469 (1958) (stating that "[a]n agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful [sic] and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned"); see also *id.* § 399(k) (stating that one remedy for a principal whose agent violates a fiduciary duty is the "refusal to pay compensation").

177. *Committee on the Resolution of Fee Disputes: Fee Arbitration Rules*, *supra* note 115.

178. The Equal Employment Opportunity Commission (EEOC) acts as a gatekeeper to the court system by issuing a right to sue letter if probable cause is found after an investigation. *E.E.O.C. v. Waffle House*, 122 S. Ct. 754, 763 (2002).

disputant, and the Chairperson from the committee on fee arbitration.

Nonlawyers. This category would include representatives from business and community entities: former disputant (client), business owner, representative from another profession, ADR specialist, malpractice insurer, and a law student.

2. Create or modify a state agency to act as gatekeeper.

This state entity would be comprised of three primary areas:

Grievance Committee. This committee would be comprised of lawyers, non-lawyers, specialists, and members from other professions.

Independent Counsel. The Independent Counsel would be appointed by the State Supreme Court, the Bar Association, State Agency, and the Department of Regulation and Licensing.

Intake Specialist. Individuals serving in this area could include: a specialist at the Office of Lawyer Regulation, a law clerk, a bar examiner, an investigator, and/or court commissioners.

3. Enact a procedural system to serve both client and attorney needs.

Step One: Review written complaint from client

- a. Determine if fee dispute is exclusive of other claims*
- b. Determine if evidence of breach of contract by either party*
- c. Determine if evidence of legal malpractice*
- d. Determine if evidence of ethical violations*
- e. Determine if evidence of violations of law*
- f. Determine if crime fraud exception applies*
- g. Determine if issues of confidentiality or waivers apply*

Step Two: Seek reply from attorney

- a. Gather facts*
- b. Seek formal answer*
- c. Raise questions*
- d. Require sworn statements*
- e. Require affidavits*
- f. Require telephone testimony*

4. Address complaints efficiently and in a timely fashion.

This objective could be achieved by various methods: imposing strict time limitations; efficiently dismissing complaints without merit; promoting negotiation and mediation; offering and explaining voluntary arbitration to clients; providing independent assessment; providing a remuneration certificate; referring the case to the appropriate authority, and/or issuing a right to sue letter.

5. Improve public awareness and education.

Various steps can be taken to improve public awareness and education. Some recommendations include: encouraging the discussion of pre-dispute agreements and ADR clauses; heightening consumer awareness about the use of ADR clauses generally; publicizing new and improved dispute resolution program; publishing and disseminating clear rules, processes and procedures manual; allowing easy access and inexpensive access to consumers and lawyers; addressing issues of fairness, leverage, power imbalance; and seeking consumer input and feedback.

VII. CONCLUSION

Attorney client disputes can arise from simple misunderstandings, a failure to communicate, allegations of legal malpractice, and violations of professional responsibility. Because clients perceive limited options, any method used to resolve disputes between attorneys and clients must be cognizant of the special trust a client must have for an attorney. Yet, the current debate among lawyers does not appear to consider the client's perspective.

Although there may not be a perfect approach, negotiation is probably the best method for resolving attorney-client disputes. However, other alternative dispute resolution processes, such as mediation, should also be considered seriously by both parties seeking to settle their disputes. The presence of a neutral third party is likely to facilitate the negotiation process, especially in light of the power imbalance between attorneys and clients. More importantly, mediation allows clients to tell their story to someone who will listen and to become part of the solution. Unlike mandatory binding arbitration or litigation, mediation does not impose an outcome on either party. Litigation is probably the least desirable approach for both parties,

because of the inherent risks of a court-imposed outcome. For similar reasons, mandatory arbitration is unlikely to resolve disputes in a way that will enhance or preserve attorney-client relationships. Instead, making arbitration mandatory and binding is apt to cause as much bitterness as litigation, especially from the losing party.

When designing a program to resolve attorney-client disputes, lawyers should seek input from lawyers in other states and other countries as well as other non-lawyer professionals. All points of view, including the client's perspective, should be considered when developing or modifying any system used to resolve attorney-client disputes.

The system should allow attorneys and clients to resolve both fee disputes and legal malpractice claims, without sacrificing their right to choose whether to negotiate, mediate, arbitrate, or litigate the dispute. The system should be based on a model that uses mediation as the main process of dispute resolution. Lawyers should be encouraged, perhaps even mandated, to utilize mediation and they should be discouraged from using the court system to litigate disputes with clients. Unfortunately, the only leverage some clients have is to take their complaint to the bar or through the formal lawyer regulation system.

Mediation may alleviate the need for clients to use the formal system, and it is likely to save time and money for everyone. It has been noted that "[a] lawyer's advice is his stock in trade."¹⁷⁹ Lawyers must protect their trade and their time. Defending a complaint is as costly, time consuming, and as risky as alleging a complaint. The system developed and implemented should be more economically efficient than litigation. Mediation saves not only time and money, but it can save reputations and relationships.

Lawyers must protect their reputations, as individuals and as members of a profession. Clients view lawyers as trusted custodians of the legal system, and the job of most lawyers entails helping clients resolve disputes in a civil, logical, methodical, and professional manner. Lawyers should be allowed to resolve their own disputes in the same manner. However, lawyers should treat clients with care and as the "customers" they are—custodians of repeat and referral business.

179. *Fee Arbitration Program*, *supra* note 13.